The Board of Trustees of the Sabah Foundation v Datuk Syed Kechik bin Syed Mohamed (No 2)

HIGH COURT (KOTA KINABALU) — SUITS NO 351 AND 352 OF 1979
IAN CHIN J
10 SEPTEMBER 1999

Costs *— Interest on costs — Compound interest — Whether prohibited — Application of English common law and rules of equity — Whether allowed — Civil Law Act 1956 s 11*

On 6 September 1999, judgment were awarded for the plaintiffs in Suit No 352 and 351 for the sum of RM29,467,915 and RM10,375,504 respectively (see [1999] 6 MLJ 497). The issue in the present case relates to the question of interest, in particular the type of interest, ie whether compound or simple. The defendants argued that: (i) compound interest could not be awarded because of the prohibition in s 11 of the Civil Law Act 1956 ('the Act'); and (ii) only the common law and rules of equity of England existing on 1 December 1951 shall apply and thus any English cases decided after that date should not be relied on. The plaintiffs submitted that compound interest could be awarded where fraud was established or where there was misused of funds by a fiduciary.

Held:

(1) The court was not prohibited by anything in s 11 of the Act from awarding compound interest. It was just that the section could not be relied as justifying the award of compund interest. In so far as the dateline of 1 December 1951 was concerned for the reception of English common law and rules of equity, the authority clearly showed that the law already existed in 1868 or 1869 (see pp 580H–581A).

(2) The evidence clearly showed that the asset in the form of Wallace Bay area was taken by DSK and Banita and that constituted the fund or asset of the plaintiffs and DSK and Banita had used it to their own benefit. That was clearly misuse. There could be no question that the fund had been utilized or put to profitable use by the defendants. Further, fraud was established justifying the award of compound interest (see pp 581C–H, 582B–C).

(3) In respect of Suit 352, compound interest at 8% pa on the sum of RM6,417,915 was awarded. The interest should run from 1 January 1978, ie the date the money was already in the hands of Banita. As for the sum of RM23.05m, it will carry interest at 8% pa from the date of judgment (see p 582E–F).

(4) In Suit No 351, the sum awarded was the profit in the form of the enhancement of Zara land which was acquired by the government but which compensation was never paid and therefore there was no question of the defendants having put the money to use. However, the compensation award carried interest at 6% pa from

20 December 1976. Therefore, the court awarded simple interest at 6% pa on the sum of RM10,375,504 from 20 December 1976 until the date of judgment and thereafter interest at the statutory rate until payment (see p 582G–H).

[Bahasa Malaysia summary

Pada 6 September 1999, penghakiman telah diberikan kepada plaintif-plaintif di dalam Guaman No 351 dan 352 untuk wang berjumlah RM29,467,915 dan RM10,375,504 masing-masing (lihat [1999] 6 MLJ 497). Isu di dalam kes ini adalah adalah berkenaan dengan persoalan faedah, secara khususnya jenis faedah, iaitu sama ada kompaun atau mudah. Defendan berhujah bahawa: (i) faedah kompaun tidak boleh diawardkan kerana larangan di dalam s 11 Akta Undang-Undang Sivil 1956 ('Akta tersebut'); dan (ii) hanya common law dan kaedah-kaedah ekuiti di England yang wujud pada 1 Disember 1951 akan terpakai dan oleh itu sebarang kes-kes Inggeris yang diputuskan selepas tarikh tersebut tidak boleh digunakan. Plaintif-plaintif menghujahkan bahawa faedah kompaun boleh diawardkan di mana frod dibuktikan dan di mana terdapat penyalahgunaan wang oleh seorang fidusiari.

Diputuskan:

(1) Mahkamah tidak dilarang oleh apa-apa di dalam s 11 Akta tersebut untuk mengawardkan faedah kompaun. Hanya seksyen tersebut tidak boleh digunakan sebagai justifikasi award faedah kompaun. Sejauh berkenaan dengan tarikh bermula 1 Disember 1951 adalah berkenaan dengan penerimaan common law Inggeris dan kaedah-kaedah ekuiti, autoriti dengan jelas menunjukkan bahawa undang-undang tersebut telah wujud pada 1868 atau 1869 (lihat ms 580H–581A).

(2) Keterangan dengan jelas menunjukkan bahawa aset di dalam bentuk kawasan Wallace Bay telah diambil oleh DSK dan Banita dan ia adalah wang atau aset plaintif-plaintif, dan DSK dan Banita telah menggunakannya untuk kepentingan sendiri. Terdapat penyalahgunaan. Tidak terdapat persoalan bahawa wang telah digunakan atau digunakan dengan menguntungkan oleh defendan-defendan. Selanjutnya, frod telah dibuktikan dan menjustifikasikan award faedah kompaun (lihat ms 581C–H, 582B–C).

(3) Berkenaan dengan Guaman No 352, faedah kompaun pada 8% setahun ke atas jumlah RM6,417,915 telah diawardkan. Faedah akan bermula dari 1 Januari 1978, iaitu tarikh wang tersebut berada di tangan Banita. Bagi jumlah RM23.05 juta, ia akan dikenakan faedah 8% setahun dari tarikh penghakiman (lihat ms 582E–F).

(4) Dalam Guaman No 351, jumlah yang diawardkan adalah keuntungan di dalam bentuk peningkatan tanah Zara yang telah

diperoleh kerajaan tetapi di mana pampasan belum dibayar dan oleh itu tidak terdapat persoalan defendan-defendan telah menggunakan wang tersebut. Walau bagaimanapun, award pampasan akan dikenakan faedah 6% setahun dari 20 Disember 1976. Oleh itu, mahkamah mengawardkan faedah mudah pada kadar 6% setahun atas jumlah RM10,375,504 dari 20 Disember 1976 sehingga tarikh penghakiman dan selepas itu faedah pada kadar statutori sehingga pembayaran (lihat ms 582G–H).]

Notes

For cases on interest on costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1275–1276.

Cases referred to

Atwool v Merryweather (1867) LR 5 Eq 464n (refd)
Attorney-General v Alford (1855) 4 De GM & G 843 (refd)
Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257 (refd)
Jones v Foxall (1852) 15 Beav 388 (refd)
Terengganu State Economic Development Corp v Nadefinco Ltd [1982] 1 MLJ 365 (refd)
Vyse v Foster (1872) 8 Ch App 309 (refd)
Wallersteiner v Moir (No 2) [1975] 1 All ER 849 (refd)

Legislation referred to

Civil Law Act 1956 s 11

Alex Decana (*Junior Koh* with him) (*Jayasuriya Kah & Co*) for the plaintiffs.

Douglas Lind (*Desmond Liaw* with him) (*Skinner Lind Willie Wong & Chin*) for the defendants.

Cur Adv Vult

Ian Chin J:

Introduction

On 6 September 1999 judgment in Suit 352 was awarded for the plaintiffs against the defendants for the sum of RM29,467,915 and judgment was also in Suit 351 awarded for the plaintiffs against the defendants for the sum of RM10,375,504 with costs in both. I left the question of interest to be argued on September 8. The issues relating to the interest to be awarded concerns: (1) the type of interest, that is whether compound or simple; (2) the date from which the interest ought to run; and (3) the rate of interest. I turn now to consider the legal principles governing the award of interest.

Legal principles

Mr Douglas Lind, learned counsel for the defendants for both suits, contended that compound interest cannot in any event be awarded because of the prohibition in s 11 of the Civil Law Act 1956 ('the Act') which reads:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
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> Provided that nothing in this section —
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> (a) shall authorize the giving of interest upon interest;
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> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
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> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

Further contended by Mr Douglas Lind was that only the common law and rules of equity of England existing on 1 December 1951 shall apply and thus any English cases decided after that date should not be relied on. Learned counsel then distinguished *Trengganu State Economic Development Corp v Nadefinco Ltd* [1982] 1 MLJ 365 as being a case coming under s 11(b) being compound interest agreed under an agreement between the parties. That case concerns the agreement in the form of several letters of a defendant to pay interest at 11% per annum. The argument there was concerned whether the interest should be compounded and the defendant there relied on s 11(a) of the Act as preventing the award of compound interest. Salleh Abas FJ (as he then was) sitting as a High Court judge said this, at pp 368-369, when dealing with that contention, viz:

> The short answer to this submission is that the interest chargeable in this case is not based on the statutory discretion given to the court under s 11 of the Civil Law Act, or under any other Act, but upon the agreement of the parties as evinced in exh P2, P3 and P4. Furthermore the language of s 11 itself leaves no room for doubt that in cases not covered by the section the court is not prohibited from giving interest upon interest. The fact that the court is not authorised does not mean that it is prevented from doing so. What therefore is the principle upon which the plaintiffs could claim the calculation of interest at rests?
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> ... It is therefore obvious that as a matter of law compound interest could be allowed by the court if there are circumstances showing that the accounting party has made profits and derived benefits by withholding the money. This principle was reaffirmed by Lord Hatherley LC in *Burdick v Garrick*(1869–70) LR 5 Ch Ap 233 as being a sound principle

That passage, in my view, clearly shows that the court is not prohibited by anything in s 11 of the Act from awarding compound interest. It is just that the section cannot be relied as justifying the award of compound interest. In so far as the dateline of 1 December 1951 is concerned for the reception of English common law and rules of equity, the case of *Burdick v Garrick*

clearly shows that the law already existed in 1868 or 1869. It appears to me that the principle allowing compound interest stem from other cases of that period, like *Jones v Foxall* (1852) 15 Beav 388; *Attorney General v Alford* (1855) 4 De GM & G 843; *Vyse v Foster* (1872) 8 Ch App 309 and *Atwool v Merryweather* (1867) LR 5 Eq 464n.

Therefore, compound interest can be awarded and the law for it existed well before 1 December 1951. It remains to be examined under what other circumstances such should be awarded other than the instant where 'the accounting party has made profits and derived benefits by withholding the money' (*Trengganu State Economic Development Corpn v Nadefinco Ltd*).

In *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 (CA) a director misused the fund of the company and he was ordered to pay compound interest. Lord Denning MR there said that 'a person in a fiduciary position is not allowed to make a profit out of his trust; and, if he does, he is liable to account for that profit or interest in lieu thereof'. He also said that where a company was deprived of it's money which it need to use for its business it should be compensated by compound interest to account for the inflation. Mr Lind argued that compound interest is only awarded, relying on Buckley LJ, at p 863, 'if it is established that he has used the money in trade' for which, learned counsel argued, there was no evidence to suggest that DSK had so used. But, as Lord Denning MR, had said and I would follow, it should be presumed that DSK or Banita made the most beneficial use of the money and it was for them to establish otherwise for which they have failed to do so. In fact Buckley LJ at p 864 also made that presumption.

Mr Alex Decena, learned counsel for the plaintiffs, had contended that where fraud has been established compound interest can be awarded which proposition of law I would agree as it is supported by 12(1) *Halsbury's Laws* (4th Ed) para 1131 which says:

> Under its equitable jurisdiction, the court has the ability to award interest as ancillary relief to its equitable remedies, such as taking an account, specific performance and rescission. The jurisdiction permits the court to award either simple or compound interest. The latter form of interest will be awarded in appropriate cases, such as where an allegation of fraud has been made good or where it has been misused by a fiduciary.

Suit 352

Mr Lind then submitted in relation to Suit 352, that: (1) there was no misuse of funds; and (2) the defendants never utilised any of the profits for trade or for making profit. As for contention (1) the evidence clearly showed that the asset in the form of the Wallace Bay area was taken by DSK and Banita and that constituted the fund or asset of the plaintiffs and DSK and Banita had used it to their own benefit. That is clearly misuse. As for contention (2) it consisted of two parts, one relation to RM6,417,915 and the other to the sum of RM23.05m. Mr Lind contended that the first sum represented the unutilized profit remaining in the bank account or that it was taken by TM while the second sum represented the damages arising from the cancellation of the licence which the defendants did not had the

opportunity to realise any profit therefrom. For a certain period, the accounts of Banita showed that a certain sum was placed in a bank account but the accounts also showed that sum around RM10m was paid to DSK. Therefore, payment to DSK or for that matter to TM was certainly for a purpose. It must have been pursuant to certain commercial transaction. Thus it cannot be denied that it was profitable to DSK. It can also be presumed that it must have been profitable to DSK and Banita for the money to have been allegedly paid to TM. There is no merit in relation to contention concerning the sum of RM6,417,915. Whatever it is, fraud was established justifying the award of compound interest and Mr Douglas Lind did not advance any argument to get round this point.

However, there is substance in the contention in his similar submission concerning the sum of RM23.05m since it represented damages as a result of the cancellation of the licence and therefore there can be no question of that sum having been utilised or put to profitable use.

As for the rate of interest, I was not addressed and I could not do any better than award the rate of 8%. It was in order to avoid further litigation or argument that I did not follow the formula in *Wallersteiner v Moir* which awarded the rate of 1% above the official bank rate or minimum lending rate in operation from time to time since that formula would involve investigation as to what the official bank rate was over a very long period of time which may not yield the data required.

The time from which interest should run should not be later that the date the money was already in the hands of Banita. The 1978 account showed that the money was already in the hands of Banita. Thus, I will take 1 January 1978 as the date which interest should begin to run.

Therefore, in respect of Suit 352, compound interest at 8% per annum, that is at yearly rests, on the sum of RM6,417,915.00 is awarded. The interest is to run from 1 January 1978 until payment. As for the sum of RM23.05m it will carry interest at 8% per annum from the date of judgment (6 September 1999) until payment. I turn now to Suit 351.

Suit 351

The sum of RM10,375,504 awarded was the profit in the form of the enhancement of Zara Land which was acquired by the government but which compensation was never paid and therefore there is no question of the defendants having put the money to use. However, the compensation award carries interest at 6% per annum from 20 December 1976. I would therefore award simple interest at 6% per annum on the sum of RM10,375,504 from 20 December 1976 until the date of judgment, 6 September 1999 and thereafter interest at the statutory rate until payment.

Delay

It was urged by the defendants that the plaintiff had delayed the prosecution of these suits by about nine years and that the period should be discounted.

A I am of the view that I was not of that conclusion when I dismissed the application of the defendants to strike out the two suits for want of prosecution. In fact the Federal Court ([1999] 1 MLJ 257) was also of the conclusion that I was of the view that the plaintiffs are not to be blamed for the delay.

B *Costs*

Costs to the plaintiffs in both suits in relation to these further proceedings concerning the award of interest.

Order accordingly.

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Reported by Jafisah Jaafar

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